No. 11,101

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MILWAUKEE MECHANICS' INSURANCE COMPANY (a corporation),
Appellant,

vs.

SILVO QUESTA and JENNIE QUESTA (husband and wife),
Appellees.

BRIEF FOR APPELLEES.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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Starting with page 2, captioned Statement of the Case: The statement of the case by appellees may be found in amended complaint (R. 3, 4, 5). The answer to amended complaint may be read (R. 8, 9, 10, 11). Page 3 sets forth matter concerning first trial wherein the judgment was reversed, 137 F. (2d) 943. The second trial was had, and a different judge was requested by appellants, and it was heard before Judge Louis E. Goodman, of San Francisco, California, who entered judgment for $4200.00 for appellees.

On page 4 of appellant's brief is set forth specifications of errors, and on page 5 is set forth summary of argument.

The foregoing may be summed up with a statement that the appellant's only objection is the manner in which Judge Goodman wrote his order for judgment (R. 14, 15). If the judge had eliminated the lines "subject to modification of said amount if defendant subsequently appraised the property at a lower figure. Not having made such appraisement, defendant was bound, as if it had issued the policy, to pay the actual loss, not exceeding $7500.00." Apparently appellant would have to seek and rely upon other specifications of errors.

On page 6 of appellant's brief, the appellant adds the following: "an extraordinary and unusual transaction". Further appellant argues: "Matters of common knowledge appertaining to insurance will be judicially noticed". The barn was in Nevada, and half of the insurance business is carried on in the street or by telephone. A call to an insurance agent telling him you desire your car insured, or your home, or barn insured, or a stock of Chinese herbs insured, they will be insured, and after appraisement the insurance will be raised or lowered. Matter of common knowledge engrosses the fact that insurance companies maintain engineers to appraise buildings, and invariably they will inform you that you do not carry enough insurance, or that you carry too much insurance.

Paragraph IV of amended complaint (R. 3, 4) sets forth that appellees applied to Frank Hassett, Esq., agent for appellees, for insurance in the sum of $7500.00, and the agent agreed to insure the barn for that sum, and to deliver its policy of insurance in the

sum of $7500.00. The Court found that to be true and fully supported by the evidence (R. 15, 16, 17, 18, 19). Many witnesses were called by both parties as to the damage suffered by the appellees, and the Court found the damage to be $4200.00.

On page 7 of appellant's brief and argument, the appellant sets forth that: "But where plaintiff seeks to recover upon a special contract he cannot depart therefrom in his evidence". Appellees did not depart therefrom. The judge in his order for judgment could have ordered his secretary to write in all of the terms of the policies for insurance used in such cases, and as much other superfluous matter as he desired. It would not be inconsistent with an insurance order or contract for insurance, and consequently would not vitiate the contract.

The appellant unrelentingly relies upon the testimony of its witnesses, and disregards the testimony of witnesses for defendants. The Court had to determine his findings from that testimony and did so and found for plaintiffs for $4200.00. Witnesses for appellant, Corica and Parrish, testified that they went to the ranch on September 9th and that Questa told them he had no insurance on the barn. Questa and his wife, and a Mrs. Parrish, testified that Parrish and Corica came in July. Mrs. Cupit bought 60 tons of hay, more or less, on July 3, 1941 (R. 218, 219). Mrs. Dorothy Parrish (R. 257) testified that Parrish and Corica were there in the middle of July, 1941. During the first trial the evidence of Parrish and Corica, and the cover note dated September 9th, were considered of

utmost importance. Mrs. Perri, who was then Mrs. Cupit, was brought to the courtroom by appellees to clear up the situation. She was called by appellant as a witness first, and her evidence shows that she bought the hay on July 3, 1941. Mrs. Cupit testified (R. 240): "A. I might have. I am usually very prompt about my insurance but I never thought of insuring hay and I never have since that time."

R. 215 shows insurance in the sum of $1000.00 placed on hay by them on date of September 9, 1941, when Corica and Parrish testified they were at the ranch. The testimony shows there were ten (10) tons of hay on that date left at the ranch at $15.00 a ton. Why should Mrs. Perri place $1000.00 of insurance on $150.00 worth of hay on September 9th? Is it not most likely that the insurance was placed on July 3rd when she had over $1000.00 worth of haw at the ranch?

The district judge had to decide the correctness of the insistent claims of their star witnesses, Corica and Parrish, that on September 9th Questa had told them there was no insurance on the barn. It is obvious that the Court believed Questas, and Mrs. Parrish and Mrs. Cupit. Appellees refer to the entire transcript of record and ask that it be read fully. Mr. Hassett testified for appellant (R. 162): "Q. Would it be correct to say that where more than a few days is to elapse, or does elapse, between receiving a firm order for insurance and the issuance of the policy, that it is customary for you to issue a cover note? A. Not customary."

AUTHORITIES.

Cited in 92 *A. L. R.* 235:

"In some instances, however, it is not essential to an oral contract of insurance that every detail should be expressly agreed upon, since an implied agreement concerning essentials is as good as an expressed agreement. Globe and R. F. Ins. Co. v. Draper, 66 F. (2d) 985."

Cited in 92 *A. L. R.* 237:

"Evidence showing that the insurer's agent assured an applicant for automobile collision insurance that his automobile was 'fully' covered renders the amount of the insurance sufficiently definite for the purposes of an oral contract, since it is reasonable to imply that the company thereby bound itself *at least in a reasonable amount.* Southern Casualty Co. v. Flowers, 23 S. W. (2d) 507, 38 S. W. (2d) 570."

For the reasons, and upon the grounds above stated, the judgment appealed from should be affirmed.

Dated, Reno, Nevada,
December 10, 1945.

WILLIAM S. BOYLE,
Attorney for Appellees.